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Supreme Court of the United States

SAM HAWKS, J. F. McKEEL and LEW WENTZ, constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER, and GEORGE N. CHURCH,

Petitioners,

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

Respondents.

No. 147

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

A complete and accurate statement of the case is contained in the opinion of the Circuit Court (R. 81-84).

The complete opinion of the Circuit Court is found in the printed transcript filed herein at pages 81-94, and is reported in 58 Fed. (2d) 41.

The substance of the holding of the Circuit Court of Appeals is as follows:

1. The franchises owned by the complainants were not limited in duration to the life or lives of the first takers, whether corporate or individual.

2. The franchises were by their terms perpetual, subject, however, to the general laws of the State of Oklahoma, which authorized the Legislature of the State to annul the franchises and the Counties to acquire, by purchase or condemnation, the rights of persons or corporations in toll bridges. Such franchises were not violative of Section 32, Art. II, Oklahoma Constitution.

3. The suit is not one against the State of Oklahoma.

The petitioner is contending:

First: That the decision of the Circuit Court of Appeals on the first two propositions is in conflict with the decisions of the Supreme Court of Oklahoma.

Second: That the decision on the last proposition is not in accord with the applicable decisions of this Court.

ARGUMENT.

The secondary franchises were granted to individuals, and the duration of such franchises was not limited to the life of the corporation to which such franchises were assigned.

The franchises to construct, erect and maintain a toll bridge across the South Canadian River were granted to Dorset Carter and Tom Halsell and their assigns in the year 1911 (R. 13-17). These franchises were assigned to Purcell-Lexington Toll Bridge Company on December 6, 1911. The Circuit Court concluded that "these franchises being perpetual and assignable, extended beyond the life or lives of the first takers, whether corporate or individual, according to the settled rules" (R. 91). The bill of complaint very clearly alleged that the franchises were granted to individuals, to wit, Halsell and Carter, and their assigns. The original franchises having been granted to individuals, their existence and duration are wholly independent of the corporate existence and duration of the corporations to which said franchises were assigned.

Grove Bridge Co. v. *State*, 133 Okla. 115, 271 Pac. 846;
Postal Bridge Company v. *State*, 139 Okla. 225, 282 Pac. 462.

If it should be conceded that the secondary franchises were granted to Halsell and Carter for the use and benefit of a corporation to be thereafter organized, such secondary

The substance of the holding of the Circuit Court of Appeals is as follows:

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If it should be conceded that the secondary franchises were granted to Halsell and Carter for the use and benefit of a corporation to be thereafter organized, such secondary

franchises were not limited in duration to the corporate life of such toll bridge corporation.

City of Owensboro v. *Cumberland Telephone & Telegraph Company*, 230 U. S. 58;
Detroit v. *Detroit Street Railway Company*, 184 U. S. 395;
City of Louisville v. *Cumberland Telephone Company*, 224 U. S. 649;
Old Colony Trust Co. v. *Omaha*, 230 U. S. 101, 112;
City and County of Denver v. *Denver Tramway Corporation*, 23 Fed. (2d) 287, 299, 300; certiorari denied, 278 U. S. 616;
State v. *Des Moines City Ry. Co.*, 159 Ia. 259, 140 N. W. 437;
Grand Rapids Bridge Co. v. *Prange*, 35 Mich. 400.

It is contended by the petitioner that the decision of the Circuit Court of Appeals on this proposition is in conflict with local decisions, but the only case cited in support of that contention is *Grove Bridge Co.* v. *State*, 133 Okla. 115, 271 Pac. 846. The following pertinent language from that case squarely supports the decision of the Circuit Court:

> "The original franchise herein having been granted to the individuals, therefore its existence is wholly independent of, and is neither connected with, nor influenced by, the corporate existence of the Grove Bridge Company, to whom the franchise was assigned by the original grantees." (271 Pac. 848.)

The general laws of Oklahoma which were in force when the franchises were granted became a part of the franchises.

Pioneer Telephone & Telegraph Company v. *State*, 38 Okla. 554, 134 Pac. 398;
Oklahoma City v. *Shields*, 22 Okla. 265, 100 Pac. 559;
Noble State Bank v. *Haskell*, 22 Okla. 48, 97 Pac. 590;
Citizens Savings Bank v. *Owensboro*, 173 U. S. 636, 644;
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322, 345;
Greenwood v. *Freight Company*, 105 U. S. 13, 20.

At the time the franchises herein involved were granted, the following general laws of Oklahoma were in force and became a part of such franchises, to wit:

Section 47 of Article IX of the Constitution, which is as follows:

> "The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the incorporators."

Section 10,076, Compiled Oklahoma Statutes 1921, which is as follows:

> "The board of county commissioners of any county of the State of Oklahoma is hereby authorized and empowered to acquire by purchase, by agreement with the owner or owners thereof, and by condemnation proceedings where agreement cannot be had, for the use of the

public, all the rights and properties of whatsoever character, of any person, firm or corporation, used for and in the operation of any toll-bridges in said county."

As the franchises were subject to repeal by the Legislature, and subject to termination at any time by purchase or condemnation, they were not void for perpetuity or irrevocableness.

The franchises were to continue until such time as the Legislature should repeal them, or until such time as the counties should elect to acquire the toll bridge property by purchase or condemnation. As it was within the power of the State or the counties to terminate these franchises at any time, they cannot be considered void for perpetuity.

> *City of Seattle* v. *Columbia, etc.* (Wash.), 33 Pac. 1048.

The Circuit Court of Appeals accordingly concluded that the franchises were not violative of Section 32 of Article II of the Constitution of Oklahoma, which is as follows:

> "Perpetuities and monopolies are contrary to the genius of free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State."

The opinion is not in conflict with City of Okmulgee vs. Okmulgee Gas Company and similar cases.

The petitioners contend that the decision of the Circuit Court is in conflict with *City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88, 282 Pac. 640, and similar cases cited at page 12 of the petition for writ of certiorari.

In the opinion of the Circuit Court it was stated that "we do not doubt that the word 'perpetuities' in said section was not intended to mean or to be equivalent to perpetual franchises, but was intended to limit the power to pass titles that would vest *in futuro*. It was so applied by the Supreme Court of Oklahoma in *McLaughlin* v. *Yingling;* 213 Pac. 552, and *In re Street's Estate,* 280 Pac. 413; 48 C. J. 929; Kent's Commentaries on American Law, Vol. 4, p. 267."

The above statement is in harmony with the holding of this Court in *Perrin* v. *Corey,* 24 How. 231, 235.

However, the Circuit Court proceeded a step further and concluded that the franchises under consideration should not be considered perpetuities, even though a perpetuity should be held to mean a thing having a perpetual duration. The following is the language of the opinion in that particular (R. 94):

> "Section 47 of Article IX does, however, provide that the Legislature may annul charters or franchises in such manner that no injustice shall be done to the incorporators. Also, Section 10,076 of the State Statutes authorizes the purchase or condemnation of rights of persons or corporations in toll bridges."

In *City of Okmulgee* v. *Okmulgee Gas Company, supra,* and the other cases cited by petitioner, the court had under consideration franchises for the furnishing of power, light, heat, gas, electricity, or water as a public utility in any

city or town of this State. Such franchises were granted by cities and towns under and subject to the provisions of Sections 5 (a) and 5 (b) of Article XVIII of the Oklahoma Constitution. It is not contended that the franchises involved in this case were issued under, or subject to, those provisions of the Constitution. The statement relative to perpetuities, in the Okmulgee case, must be construed in connection with the principal conclusion running throughout the opinion, to wit, that Sections 5 (a) and 5 (b) of Article XVIII provide how a municipal franchise may be created, extended or renewed, and limit the period to 25 years, and as those sections of the Constitution vested that power in the municipalities, such power could not be exercised by the Legislature, and as the provisions of the act which was under consideration attempted to take away from the municipalities the power to alter, amend, or repeal a franchise, and attempted to deprive the municipalities of the power to limit the duration to 25 years, such act, as far as the municipalities were concerned, would create a franchise of perpetual duration, as the only authority to repeal was in the Legislature. In other words, the power of altering, renewing and extending such franchises, which the Constitution had vested in the municipalities, and limited to a peroid of 25 years, the Legislature had attempted to usurp, with the result that a municipality which had granted a franchise under authority of the Constitution,

was powerless to control its termination, renewal or extension. The pertinent language of the Oklahoma court in that particular is found in *City of Okmulgee* v. *Okmulgee Gas Company,* 282 Pac. 640, at page 649, as follows:

> "This section is very similar to the provisions of Section 47 of Article 9, but there is a material difference in the language employed in Sections 5 (a) and 5 (b) of Article 18, and the language employed in Section 47 of Article 9, and of Section 4 of House Bill No. 4. By Sections 5 (a) and 5 (b) of Article 18, *supra,* it is provided how a charter may be granted, extended, or renewed, and limits the period for which it may be granted, and the period to which it may be extended or renewed to 25 years. Under House Bill No. 4, the revocable permit is simply a perpetual franchise which may be altered, amended, annulled, or revoked by the Legislature of Oklahoma only whenever in its opinion such franchises may be injurious to the citizens of the State.
>
> "Further, the municipality is deprived by House Bill No. 4 of renewing or extending a franchise and the qualified electors of a municipality equal to 25 percentum of the total number of votes cast at the next preceding general municipal election are deprived of their right of demanding that a franchise be granted, extended, or renewed, and the qualified electors by a majority vote thereof are deprived of the right of expressing their opinion as to whether or not the franchise should be granted, extended, or renewed, and, if a majority should vote in favor thereof, the proper authorities of the municipality cannot perform the ministerial duty which this court has held was enjoined upon them by the Constitution."

In the matter of toll bridge franchises, there are no constitutional provisions similar to Sections 5 (a) and 5 (b) of Article XVIII, and the Legislature has full power to

alter, repeal or modify such franchises under Section 47 of Article IX of the Constitution, and the counties have full power to terminate such franchises by purchase or condemnation of the property. The decision of the Circuit Court of Appeals, therefore, is not in conflict with the above opinion.

State Court decisions, construing State constitutional provisions after contracts had been entered into and rights had accrued thereon, are not binding on Federal courts, and Federal courts assert the right to adopt their own interpretation of the law applicable to the case.

Pease v. *Peck*, 18 How. 595;
Thompson v. *Perrine*, 103 U. S. 806;
Burgess v. *Seligman*, 107 U. S. 20;
Folsom v. *Township*, 159 U. S. 611;
Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349;
Moore-Mansfield Construction Co. v. *Electrical Installation Company*, 234 U. S. 619;
Enfield v. *Jordan*, 119 U. S. 680;
Bolles v. *Brimfield*, 120 U. S. 759;
Barnum v. *Okolona*, 148 U. S. 393;
Motherscad, Bank Commissioner of Oklahoma, v. *U. S. F. & G. Co.*, 22 Fed. (2d) 644;
City and County of Denver v. *Denver Tramway Corporation*, 23 Fed. (2d) 287; certiorai denied 278 U. S. 616.

The franchises were granted in 1911 (R. 4-5). At that time Section 32 of Article II of the Oklahoma Constitution prohibited perpetuities, but there was no definition of the word "perpetuities" contained in such constitutional provision, and it was necessary to look to the general law for

such definition. There was no decision of the Supreme Court of Oklahoma on the subject until the decision in *McLauglin* v. *Yingling, supra,* decided in 1923, and the common-law definition was adopted in that case. The decision in *City of Okmulgee* v. *Okmulgee Gas Company* was rendered in 1929.

If the decision of the Circuit Court should be considered in conflict with the Oklahoma decisions cited by the petitioners, the Circuit Court's opinion is in conformity with the settled law as the same existed at the time the rights accrued under the franchise, and it was not error for that court to decline to follow such decisions of the Supreme Court of Oklahoma which were decided eighteen years after the rights had accrued under the franchises.

The suit is not against the State of Oklahoma.

Reagan v. *Farmers Loan & Trust Company,* 154 U. S. 362, 390;
Old Colony Trust Co. v. *City of Seattle,* 271 U. S. 426;
Missouri, Kansas & Texas Ry. Co. v. *Missouri Railroad & Warehouse Commissioners,* 183 U. S. 53, 59;
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Cline v. *Frink Dairy Co.*, 274 U. S. 445.

Respectfully submitted,

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